CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]370

W. S. WEBB AND JACOB GOLDBAUM

vs.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 23, 1918.

(26,350)

(26,350)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 883.

W. S. WEBB AND JACOB GOLDBAUM

vs.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print
Certificate from the United States circuit court of appeals for the sixth circuit	1	1
Statement	1	1
Questions certified	4	3
Judges' signatures	4	4
Clerk's certificate	5	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1918.

Filed Feb. 11, 1918. Wm. C. Cochran, Clerk.

1 United States Circuit Court of Appeals, Sixth Circuit.

No. 3068.

W. S. WEBB and JACOB GOLDBAUM, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

Submitted January 10, 1918, Certified February 11, 1918.

Before Warrington and Denison, Circuit Judges, and Sessions, District Judge.

PER CURIAM:

Having concluded that the controlling question herein is one that must be certified to the Supreme Court, we proceed to state our conclusions of fact and law which lead to this necessity.

Plaintiffs in error complain of judgment and sentence against them under the first count of an indictment charging that they conspired contrary to §37 of the Penal Code, to violate the Act of December 17, 1914 (38 St. p. 78; U. S. Comp. St. §6287*g*),—known as the Harrison Anti-Narcotic Law. They claim that the indictment should have been quashed or that verdict should have been directed in their favor.

The indictment is most inartificial; but we conclude that it sufficiently supports a prosecution based upon the theory that both respondents intended to have Goldbaum violate the law by using the order blanks for a prohibited purpose. Upon no other theory can we find it charged that both respondents intended any act which is both described in the indictment and which may be a violation of the Harrison Act. This theory, as applied to the facts hereafter cited, brings us to the double quesion whether the law should be so construed as to reach and punish Goldbaum's conduct; and, if so, whether such construction makes the act unconstitutional.

Goldbaum was in the business of selling at retail, and to the users thereof, drugs, including morphine. Such sales were
2 lawful, prior to the passage of this Act, and they continued to be lawful, except as therein forbidden. The clause in the latter part of §2 Prohibited Goldbaum from using the statutory order forms to get morphine for any purpose other than the sale by

him in the conduct of a lawful business by him in such drugs. Taking the hereafter stated sale to Rabens as typical, the question is whether this sale, otherwise lawful, was forbidden by any part of the act. If so, it was by the broad prohibitory language of the first part of §2. Applying this language to the Rabens case (and unless this purchase was within the exception *b*), it is declared to be unlawful for Goldbaum to sell morphine to Rabens unless Rabens produces therefor a blank order form; and since these order forms can only be furnished to registered dealers and can be used by no one else, and since Rabens was not of that class, it follows that sales by Goldbaum to the ordinary retail purchaser are absolutely forbidden, unless made on the physician's prescription of exception (*b*).

In United States v. Jin Fuey Moy, 241 U. S. 394, it was held that although the general language of §8 prohibited possession of morphine by any unregistered person and although exceptions found in the body of that section indicated that the inhibition of the section was intended to reach persons who could not register (because it excepted some persons who could not register), yet, taking the whole act together and considering the danger to the validity of the whole act resulting from the natural construction of §8 considered alone, it must be considered that the prohibition extended only to those who could register. By analogy, it is now urged that although the prohibition in the early part of §2 against selling to any person not provided with a blank order is universal in form, and although other parts of this section indicate that it was intended to reach persons who could not get order forms (for it in effect declared that it did not except the ordinary retail purchaser unless he had a physician's certificate) yet the prohibition should, upon the whole, be construed as extending only to those persons who were by law allowed to procure order blanks; and that the contrary construction would make the act unconstitutional,—since the prohibition of sales by a retailer, who has registered under the law and paid his full tax, has no reasonable relation to the raising of revenue. In the latter connection, it is also urged that, since the law can not rest upon any police power in Congress, if the sale of these drugs may be prohibited by regulation appurtenant to a dealer's tax of a dollar
3 a year, then Congress may prohibit the sale of liquor except upon a physician's prescription, or of shoes, except upon a bureau certificate. On the other hand, the great public benefit of this regulation, to be made by the competent legislature, is obvious, the law has been generally enforced for three years according to the government's present contention, and the Supreme Court, with clear opportunity to hold generally that the sale prohibitions were unconstitutional, refrained from so doing.

If section 2, rightly construed, forbids sales to a non-registrable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are "prescriptions," within the meaning of exception (*b*) in section 2.

We conclude that the case can not be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the

facts as follows,—assuming, as for this purpose we must do, that whatever the evidence tended to show in aid of the prosecution, must be taken as a fact:

Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users upon their application to him therefor. He furnished these "prescriptions," not after consideration of the applicant's individual case, and in such quantities and with such directions as, in his judgment, would tend to cure the habit or as might be necessary or helpful in an attempt to break the habit, but without such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by §1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by §2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine, which morphine he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum and without any physician's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers, in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; that Webb regularly charged fifty cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over 4,000 such perscriptions; and that one Rabens, a user of the drug, came from another state and applied to Webb for morphine and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Rabens' presentation, although each was made out in a separate and fictitious name.

4

Upon these facts, we desire the instruction of the Supreme Court for our proper decision of the following questions of law arising thereon:

1. Does the first sentence of §2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?

2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (*b*) of section 2?

If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial.

J W. WARRINGTON,
A. C. DENISON,
C. W. SESSIONS,
Judges of the Circuit Court of Appeals of the Sixth Circuit, sitting in this cause.

5 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of W. S. Webb and Jacob Goldbaum, Plaintiffs in Error vs. United States of America, Defendant in Error, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 12th day of February, A. D. 1918.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 26,350. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 883. W. S. Webb and Jacob Goldbaum, vs. The United States of America. (Certificate.) Filed February 23d, 1918. File No. 26,350.

Office Supreme Court, U. S.
FILED
NOV 16 1918
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB and JACOB GOLDBAUM,

vs. **No. 883**

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT OF W. S. WEBB AND JACOB GOLDBAUM.

RALPH DAVIS,
Attorney for Webb and Goldbaum.

TOOF-MEMPHIS

In the Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB and JACOB GOLDBAUM,

vs. No. 883

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT OF W. S. WEBB AND JACOB GOLDBAUM.

STATEMENT OF CASE.

Webb and Goldbaum were convicted in the District Court of the United States for the Western District (Western Division) of Tennessee of a conspiracy to commit an offense against the United States, to-wit, to violate the "Harrison Narcotic Act," in violation of Section 37 of the Criminal Code. The facts may be succinctly stated as follows:

Webb was a practicing physician and Goldbaum

a retail druggist. Both were duly registered and had paid the tax as required by the provisions of the Act. It was Webb's custom to prescribe morphine to habitual users upon their application to him therefor. Goldbaum was familiar with this practice and constantly filled the prescriptions. Goldbaum was provided with the blank forms contemplated by Section 2 of the act and by use thereof had obtained copious quantities of morphine from wholesale dealers. It was agreed and understood by Webb and Goldbaum that the latter should, by the use of these forms, procure a stock of morphine, which he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of both that morphine should be thus furnished by Goldbaum to habitual users thereof, but without any physician's prescription issued in the course of a "good faith" attempt to cure the morphine habit.

A writ of error to the judgment of conviction was sued out from the Circuit Court of Appeals for the Sixth Circut, which has certified to this Court the following questions:

1. "Does the first sentence of Section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who

can not obtain an order blank because not of the class to which such blanks are allowed to be issued?

2. "If the answer to Question 1 is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

3. "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being used for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of Section 2?"

ARGUMENT.

In the indictment in the District Court, Webb and Goldbaum were charged with conspiring to violate a public law of the United States, namely, the Harrison Narcotic Law, and the alleged acts of commission averred by pleader in indictment were based upon the following clause in Section 2 of said act: "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

The first sentence of Section 2 of the Harrison Narcotic Act is as follows: "That it shall be unlawful for any person to sell, barter, exchange or give away any of the aforesaid drugs, except in pursuance of a written order of the person to whom said article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

It is the contention of the writer that where a druggist registers, pays the tax and obtains a narcotic drug on a form provided by the Commissioner of Internal Revenue (these being prerequisites for a druggist to dispense and distribute narcotic drugs)

that he has a right to dispense directly to the consumer without a physician's prescription; that that part of the Harrison Narcotic Law inhibiting a druggist from dispensing narcotic drugs except upon a physician's prescription, is a violation of a police regulation, which the Congress has no power to establish, the act to that extent being an invasion of the reserved power to local regulation inherent in the State governments and in violation of the Constitution of the United States.

Amendment to the Constitution, Article 10, provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

In construing this article, your Honorable Court has repeatedly held "that the power of the States to regulate matters of internal police within their limits applies not only to the health, morals and safety of the public, but also to whatever promotes the public peace, comfort and convenience." Boston R. R. Co. v. Mass., 97 U. S. 25, also authorities cited in paragraph 10, Notes of Decisions U. S. Compiled Statutes Annotated, 1916, Vol. 11, p. 14419. This reserved police power retained in the States has reference to the practice of medicine, etc. See Meffert v. Packer, et al., 195 U. S. 625.

In the case of U. S. v. Jin Fuey Moy, 201 U. S. 394, the Harrison Narcotic Law was held to be a revenue measure. In the case of In re Kollock, supra, 165 U. S. 526, Chief Justice Fuller expressed himself as follows:

> "The act before us is on its face an act for levying taxes and, although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. * * The oleomargarine legislation does not differ in character from this (laws relating to distilled spirits and tobacco) and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue, protection to purchasers in getting the real and not a spurious article, cannot be held to be the primary object in either instance and the identification of dealer, substance, quantity, etc., by marking and branding, must be regarded as means to effectuate the objects of the act in respect of revenue."

In the case at bar in testing the constitutionality of the question suggested, the controlling factor, as declared by Justice Fuller, applied to the certified questions, that is, "whether or not the retail sale of morphine by a druggist to persons who have no physician's prescription, who have no order blank

therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued," and, second, "if a practicing and registered physician issues an order for morphine to a habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use," should be, are these regulations and restrictions to be regarded as "means to effect the objects of the act in respect of its revenue?

Would the doing of either of the acts in certified questions be such acts of commission or omission as could be styled offenses against the laws of the United States? Applying the test prescribed by Justice Fuller, would the sale of morphine by a druggist to a person who has no physician's prescription, who has no order form and who cannot obtain an order form because not of the class to which such blanks or forms are allowed to be issued, be regarded as a means to effect the object of the act in respect of its revenue?

In a recent case in the United States Circuit Court of Appeals for the Seventh Circuit, when identically the same questions as the certified questions in the case at bar were considered by the Court (Blunt v.

U. S. of America), Justice Mack, delivering the opinion of the Court, said:

> "If an act is in fact a revenue law, it is beyond the province of the courts to inquire into its wisdom, justice or efficiency the motives that led to its enactment, or its incidental effect as a police measure. The regulation of private morals, the suppression of frauds upon the public, or the protection of industry that may result from a revenue law, will not change its character or invalidate it, if it be otherwise constitutional. McCray v. U. S., 195 U. S. 27. And in the exercise of a power granted to it, whether it be that of taxation as in Felsenheld v. U. S., 186 U. S. 126, sustaining the constitutionality of the italicised section of the clause of the Dingle Tariff Act (copied as foot note) 2, or that of regulating commerce as in Hoke v. U. S., 227 U. S. 308, sustaining the constitutionality of the White Slave Traffic Act, of June 25, 1910, C. 395 (36 Stat. 825), or in Hipolite Egg Co. v. U. S., 220 U. S. 45, sustaining the constitutionality of the Pure Food Act (34 Stat. 768), Congress may adopt 'not only means necessary but convenient to its exercise and the means may have the quality of police regulations.'
>
> "And in the Felsenheld case, it was held to be within the power of Congress, to keep the package of tobacco to which a stamp was affixed to indicate payment of the Federal tax on the tobacco, free from extraneous articles, such as prize or premium coupons, because, as Justice

> Brewer said, the Government has the 'power to prescribe that the package which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed.' "

And again:

> "This, however, is the sole purpose and intent of the last clause in Section 2. No question of tax or revenue or the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtain the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment, this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the State."

The main purpose of the act is to provide for a tax and enforce its collection, for the legitimate sale or disposal of opium and its derivatives. Any regulation, law or provision that aids in the enforcement or collection of this tax is within the rights of Congress. A consideration of the whole Act and of the many regulations of the Treasury Department governing the sale and control of the drug leads to the conclusion that greater efforts are made in the

measure to protect against the misuse of the drug than to its enforcement as a revenue act.

This reasoning applies more forcibly to the third query. There, the regulations requiring the drug to be dispensed by a physician only in the course of professional practice, after having duly registered and paid the tax, can only be a police measure looking primarily to the protection of the public against the abuse of this drug, not remotely serving as an aid, the means to effect the object of the Act in respect of its revenue. Are these regulations to be considered as incidental or as means to enforce the collection of the revenue?

In the case of Mugler v. Kansas, 123 U. S. 623-661, referring to the so-called Prohibition Statute of Kansas attacked as unconstitutional as being in effect a confiscation of property under the pretense of protecting the public morals, health and safety, says:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution."

Applying this rule of construction, it would seem to be the court's duty to see that the real purpose of the Act as a revenue measure should be carried into effect, but that those provisions of the act regulating and restricting traffic in the drug should be confined to their incidental functions, "as means to effect the object of the act in respect of its revenue," and to that extent strictly construed.

The sale of morphine to a person not made in pursuance of that person's written order, as required by the statute, the sale "not in the regular course of professional practice," the fact that the one to whom the sale is made is known as a "dope fiend," does not tender to render effectual the collection of the revenue tax imposed by the act. To extend the incidental moral objects of the taxing measure by a liberal construction would be to unfairly and without certain right encroach upon the state's sovereign powers.

The Harrison Narcotic Law is not a police measure. The relationship of the Federal Government to the traffic in narcotic drugs or in anything else is limited to the exercise of the taxing power and to interstate commerce transactions.

In view of the foregoing, the writer contends that Query One should be answered in the affirmative and

that this construction makes unconstitutional the prohibition of such sale.

Respectfully submitted,

RALPH DAVIS,
Attorney for Webb and Goldbaum.

-1-

Office Supreme Court, U.
FILED
DEC 24 1918
JAMES D. MAHER,
CLE

No. 370.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB AND JACOB GOLDBAUM,

VS.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF AND ARGUMENT OF FRANS E. LINDQUIST, AMICUS CURIAE.

FRANS E. LINDQUIST,
Amicus Curiae.

No. 370.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB AND JACOB GOLDBAUM,

VS.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF AND ARGUMENT OF FRANS E. LINDQUIST, AMICUS CURIAE.

Counsel deems it a very great honor to have the privilege of filing a brief as *Amicus Curiae* in this case. He is not attorney for *W. S. Webb* or *Jacob Goldbaum*. He is, however, attorney in case of *Frank Stetson, Plaintiff in Error, vs. The United States, Defendant in Error*, No. 3217, in the *United States Circuit Court of Appeals for the Sixth Circuit*, in which case said court postponed

its decision until the constitutionality of the Harrison Act could be heard and determined by this Honorable Court. Hence, the writer will endeavor to assist this Honorable Court in answering the three certified questions.

> "1. *Does the first sentence of Sec. 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physicians' prescription, who have no order blank therefor, and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?*"

It is too plain for any argument that the first sentence of Section 2 of the Harrison Act is an absolute prohibition against selling, bartering, exchanging or giving away any such drugs, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. It is also very plain that no one except those who have registered and paid the annual tax, are entitled to obtain such blanks. Hence, question 1 should be answered in the affirmative.

> "2. *If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?*"

Article 10 of Amendments to the Constitution of the United States provides:

> *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."*

Mr. Justice Holmes, in case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, said:

> *"It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of revenue measure, was right."*

Section 8 of the Constitution of the United States provides what powers Congress shall have. Congress can pass no laws except as expressly authorized by the Constitution. The Legislatures of the states, however, can pass any laws which are not prohibited or in conflict with the State and Federal Constitutions.

Now, by all process of reasoning, if the Harrison Act is only a revenue measure, how can it be contended that Congress should have the power of designating to whom such licensed person may not sell, barter, exchange or give any of such drugs?

In *Hammer* v. *United States Attorney* (1918), 247 U. S. 1. c. 273, Mr. Justice *Day* said:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> *The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.*
>
> *Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,'* said this court

> in *United States* v. *Dewitt*, 9 Wall. 41, 45, '*has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.*' See *Keller* v. *United States*, 213, U. S. 138, 144, 145, 146; Cooley's Constitutional Limitations, 7th Ed. p. 11."

While we do not contend that the power of Congress depends on the action of the Legislature, we respectfully call attention to the fact that the Legislature of the State of Tennessee (Pub. Acts 1st Ex. Sess. 1913, ch. 11), did pass a law prohibiting the sale or distribution of opium or any derivative thereof, with a proviso that a physician may prescribe the drugs when in personal attendance on a patient. Doctor H. B. Hyde was indicted under this Act of (1) an unlawful sale, and (2) an unlawful distribution of morphine, a derivative of opium. He challenged the constitutionality of said Act, by a motion to quash the indictment, which motion was overruled. A verdict of guilty was duly rendered. He filed motion for a new trial and in arrest of judgment, both of which were overruled. He appealed to the Supreme Court of Tennessee, being case of *Hyde* v. *State* (1914), 131 Tenn. 208. *Held*

> "Public Acts 7st Ex. Sess. 1913, ch. 11, prohibiting the sale or distribution of opium or any derivative thereof, except that a physician may prescribe the drugs when in personal attendance on a patient, does not deprive a physician of his liberty or property without due process of law as arbitrarily curtailing his right to practice by prescribing ac-

cording to methods formerly obtaining, *but is a valid exercise of the police power to regulate the sale and distribution of dangerous drugs.*"

In the matter of Yun Queng (1911), 159 Cal. 508, the petitioner was arrested and detained on a charge of violating Statutes of California, 1909, page 422, entitled, "An Act to regulate the sale and use of poisons in the State of California, and providing a penalty for the violation thereof." He applied for a writ of *habeas corpus. Held,*

> *"When it is determined that any act is within the police power of the state, nothing further need be said. The rest is left to the discretion of the law-making power in the exercise of that plenary power in the state, which enables it to prohibit all things hurtful to the public welfare.*
>
> *Opium is an active poison, which has no beneficial use except as a medicinal drug; and its unrestricted use would have a debasing and harmful effect on the moral and economic welfare of a large portion of our population; and the act which permits its use under all circumstances, while otherwise prohibiting its possession, is a valid regulation within the general police power of the Legislature."*

In case of *Meffert* v. *The State Board of Medical Registration and Examination* (1903), 66 Kan. 710, 72 Pac. 247, the Supreme Court of Kansas held:

> "The clause in the Fourteenth Amendment to the Constitution of the United States 'Nor shall any state deprive any person of life, liberty, or property, without due process of law,' *is not a limitation upon the police power of the state to pass and enforce such laws as in its judgment will inure to the health, morals and general welfare of its people.*"

This Honorable Court affirmed this case (1904), *Meffert* v. *Packer et al.*, 195 U. S. 625.

District Judge West, in case of *The United States* v. *C. T. Doremus*, on January 2, 1918, in a very able opinion, held that the Harrison Act is unconstitutional. The Government sued out a writ of error, and said cause is now *The United States of America* v. *C. T. Doremus*, No. 367. Judge West's opinion is printed in the transcript of record, and is so full of sound reason and common sense that it ought to be adopted as the opinion of this court.

Mr. Willis Reed Bierly in "Police Power State and Federal," says:

> "To comprehend the delimitation between Federal and State police power, it is necessary to keep in view the distinction between the Federal and State Constitutions. In the Federal Constitution all powers not conferred by the states are reserved to the states, in addition to those powers expressly reserved. (1) In a State Constitution all powers not reserved therein from the domain of legislation are conferred upon the legislative power. (2) Thus, there, the Federal power is supreme and the state power must give way, in all cases where Congress and the president are expressly given control of the subject matter, and such power may be exercised anywhere within the United States or its territories. *And, on the other hand, with respect to the subjects not granted to the United States, the states severally are supreme within their respective jurisdictions.*" (Sec. 1, ch. 2.)

The United States Circuit Court of Appeals for the Seventh Circuit, in case of *Blunt* v. *The United States*,

recently held that this part of Section 2 is unconstitutional, in that

> *"this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the states."*

This case was heard before *Baker, Mack,* and Kohlsaat, Circuit Judges. Judge Kohlsaat concurred in such conclusions, but died before the opinion was prepared. A petition for a rehearing has been filed.

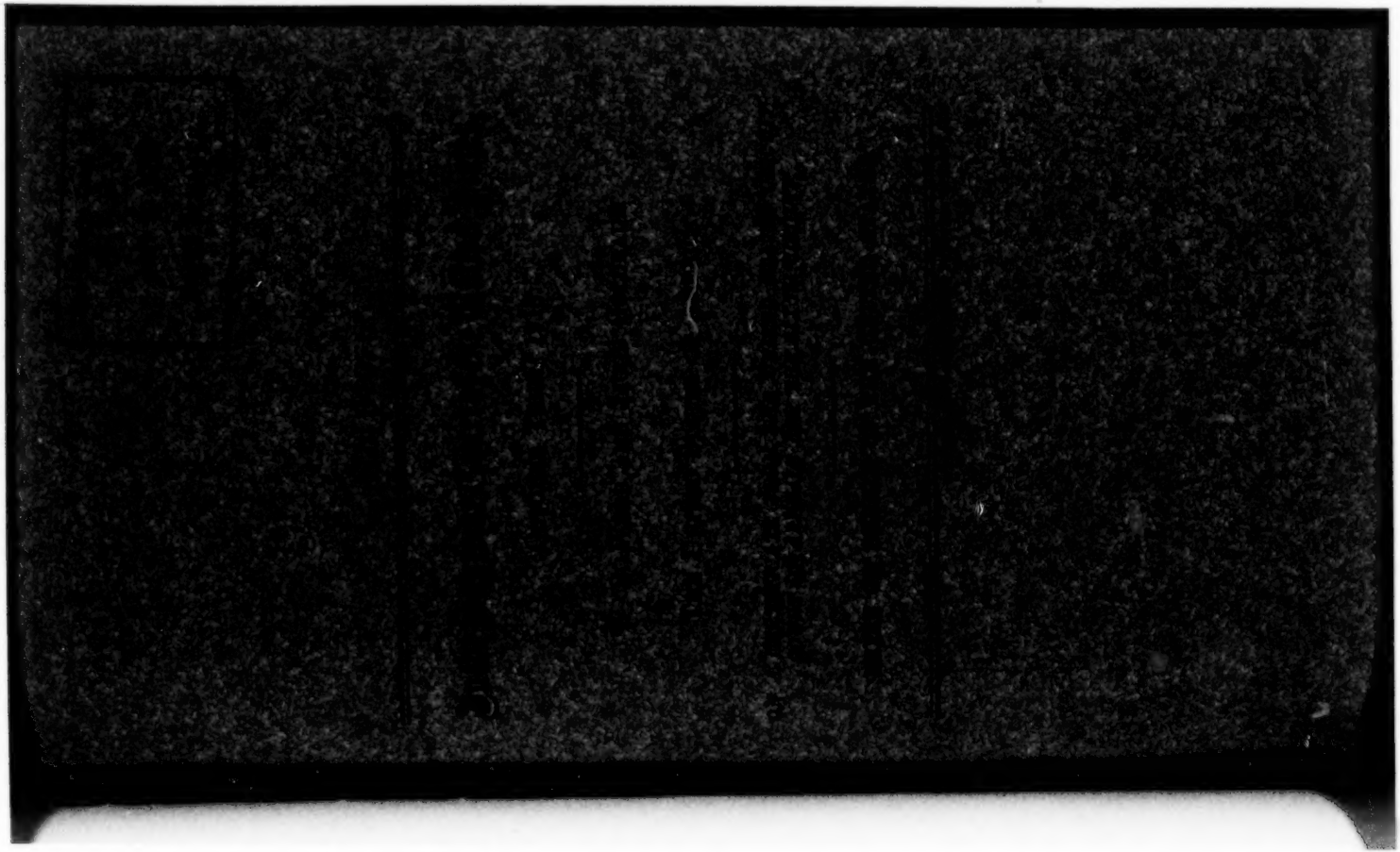
The United States Circuit Court of Appeals for the Eighth Circuit, in cases of *J. H. Hughes, Plaintiff in Error,* v. *United States of America,* and *U. S. G. Hughes, Plaintiff in Error,* v. *United States of America,* upheld the law. Petitions for rehearing have been filed.

Accordingly, we respectfully submit that it will not be necessary to consider the third question, conditionally submitted.

Respectfully submitted,

FRANS E. LINDQUIST,
Amicus Curiae.

Kansas City, Mo.
Dec. 17-'18.



INDEX.

	Page.
STATEMENT OF CASE	1
ANALYSIS AND MEANING OF STATUTE	3
(*a*) Abstract of statute	3
(*b*) Meaning of statute	6
ARGUMENT	9
(*a*) *Question 1.* Construction of section 2	9
(*b*) *Question 2.* The constitutionality of the act as so construed	12
(A) THE AUTHORITIES	12
(1) Certain general decisions on the use of the taxing power as affecting social or moral questions	13
(2) Special authorities	20
(3) Application of these authorities and conclusion of argument as to the constitutionality of section 2	32
(*c*) *Question 3*	34
CONCLUSION	35

AUTHORITIES CITED.

American Sugar Refining Company v. *Louisiana*, 179 U. S. 89	17
Baldwin v. *United States*, 238 Fed. 793	35
Billings v. *United States*, 232 U. S. 261	13
Brushaber v. *United States*, 240 U. S. 1	15
Cook v. *Marshall County*, 196 U. S. 261	18
Felsenheld v. *United States*, 186 U. S. 126	24
Foreman v. *United States*	35

	Page.
Head Money Cases, 112 U. S. 580	15
Hughes v. *United States*	35
In re Kollock, 165 U. S. 526	15, 20
Knowlton v. *Moore*, 178 U. S. 41	15
License Tax Cases, 5 Wall. 462	13
Magoun v. *Bank*, 170 U. S. 283	15
McCray v. *United States*, 195 U. S. 27	16, 21
Mountain Timber Co. v. *Washington*, 243 U. S. 219	19
Nicol v. *Ames*, 173 U. S. 509	21
United States v. *De Witt*, 9 Wall. 41	30
United States v. *132 Packages*, 76 Fed. 362	27
United States v. *Calhoun*, 39 Fed. 604	18
United States v. *Jin Fuey Moy*, 241 U. S. 394	2, 5, 19
United States v. *Rosenberg*, 251 Fed. 963	35
Veazie Bank v. *Fenno*, 8 Wall. 533	14

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

W. S. WEBB AND JACOB GOLDBAUM
v.
THE UNITED STATES OF AMERICA. } No. 370.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The case is here on certificate from the Court of Appeals for the Sixth Circuit. The certificate states that Goldbaum, a druggist, and Webb, a physician, were indicted for conspiring to violate section 2 of the act to provide for the registration of, and the imposition of, a special tax upon producers and dealers in opium, etc., approved December 17, 1914, 38 Stat. 785, and were tried, convicted, and sentenced.

The certificate construed the indictment as charging Webb and Goldbaum with conspiring to have Goldbaum violate the law by using order blanks for a prohibited purpose.

The clause in the latter part of section 2 prohibited Goldbaum from using the statutory order forms to get morphine for any purpose other than the sale by him in the conduct of a lawful business in such drugs.

He made a sale to one Rabens who did not produce an order blank (nor a genuine prescription).

The certificate states that if such sale without an order blank is prohibited by the act, it is because the prohibition in the first part of section 2 of said act is broad enough to embrace all persons.

The certificate then (R. 2) discusses whether, under the decision of this court in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, the general prohibition of the first paragraph of section 2 should not be limited to those persons who, under the later provisions of said section, could procure the official order forms as being dealers required to register and pay the special tax under the provisions of section 1. It states as the facts of the case that Goldbaum was a druggist and Webb a physician, both having registered and paid the special tax, and that they entered into a conspiracy that Goldbaum should procure, by the use of official order forms, a large supply of morphine which he would sell to any person and in any quantity designated in Webb's so-called "prescriptions," and that Webb should furnish such "prescriptions" to any one who called on him without reference to whether he called on him in the capacity of a patient or not (R. 3). The certificate then asks the instructions of this court on the following questions (R. 5, 6):

1. Does the first sentence of § 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued.

2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (*b*) of section 2?

ANALYSIS AND MEANING OF STATUTE.

(a) Abstract of Statute.

The act in full is printed in an appendix to this brief. An abstract of it is given by this court in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 399, 400, but, as that abstract was directed to the meaning of section 8, and not especially to that of section 2, the following additional summary of the act is submitted.

The act is entitled:

> An act to provide for the registration of, with collectors of internal revenue, and to

> impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives or preparations, and for other purposes.

Section 1 provides that persons doing the things mentioned in the title must register with the collector of internal revenue, and must pay a special tax of $1 per annum. Exception is made of the employees of such persons and of Federal and State officers acting in their official capacity. It is made unlawful for any person to do the things mentioned in the title without having registered and paid the tax, and the Commissioner of Internal Revenue is given the usual power to make administrative regulations.

Section 2 is the important one for the purpose of the present case. It provides:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given; on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

The transferor must preserve the order for inspection, and the transferee preserve a duplicate for the same purpose. Four exceptions are made to this requirement of transfers on order forms only, but only the first two are material for the purpose of the present case.

(*a*) A physician may dispense or distribute the drugs directly without an order form, but this he can

only do to a patient "in the course of his professional practice," and under the obligation to keep a record of the drugs so dealt in, except in the case of personal attendance on a patient.

(*b*) A druggist or other ordinary dealer in the drugs may sell them to a consumer without an order form, provided the consumer produces the written prescription of a physician registered under the act.

By the last paragraph of the section it is provided that the order forms, without which the drugs may not be transferred except through the intervention of a physician, can only be sold to persons who have registered and paid the special tax, and it is expressly provided that—

> It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.[1]

[1] The remaining provisions of the act are not exactly germane to the present case and can therefore be placed in a note. Section 3 requires a registered person to give a full report of the drugs received by him. Section 4 prohibits the interstate or analogous transportation by persons not registered. Section 5 provides for the preservation of the order forms, prescriptions, and returns, and their publicity or nonpublicity under certain circumstances. In this respect the act follows the general internal-revenue system on this subject. Section 6 is a *de minimis* section. Section 7 has the usual provision in internal-revenue statutes as to the application of the general administrative internal-revenue laws. Section 8 was construed in Jin Fuey Moy's case (241 U. S., 394). As so construed, it relates only to producers, dealers, etc., and prohibits the possession by them of the drugs unless they have registered and paid the special tax. Section 9 fixes the penalty for violation of any of the previous requirements of the act. Sections 10, 11, and 12 do not require consideration.

drugs to them either from a physician directly or from him indirectly through a prescription to a druggist. This is the normal way in which a bona fide consumer would procure the drugs, and it is therefore the only way Congress was bound to recognize. In order, however, to prevent frauds on the revenue by the obtaining of the drugs under the guise of bona fide consumers by persons who in truth intended to become dealers in them without registering and paying the special tax, it required that physicians dispensing the drugs directly should do so only to "patients" treated in the course of professional practice, and that druggists should dispense the drugs only on "prescriptions" issued by a physician, and that neither of them should procure the drugs on order forms for any purpose other than the distribution of them to bona fide consumers—that is, genuine patients of a physician. These provisions gave sufficient legitimate opportunity to genuine consumers, although, like all revenue laws, working possibly inconvenience in individual cases. They likewise prevent (and this was clearly their purpose) persons intending to deal in the drugs from procuring large supplies in the guise of pretended "patients" or on bogus "prescriptions," and confined such persons to the use of official order forms which they could not procure unless they registered and paid the special tax.

The act thus looked at hangs together. It is true, of course, that it also had the moral purpose of dis-

couraging the use of the drugs except as a medicine, but its main purpose as a revenue measure to see that dealers in the drugs do not escape the tax (as dealers in such drugs have a great opportunity to do) is clearly evidenced by the provisions as to order forms with their only alternative of a genuine prescription to a bona fide patient. These provisions to prevent fraud on the revenue may be drastic, but it cannot be said they are not effective from a revenue point of view.

ARGUMENT.

(a) Question 1.—Construction of section 2.

The first question is whether the provision of the first paragraph of section 2 prohibiting the sale, etc., of the drugs except upon a written order of the purchaser, etc., on an official order form, which official order forms can be procured only by registered persons, applies to the sale, etc., of the drugs to persons who can not procure said official forms because they are not producers of, or dealers in, the drugs. In other words, the question is whether the system of order forms and administrative supervision applies to sales, etc., to consumers.

The same question of construction would arise under the next to last paragraph of the section, for if sales, etc., of the drugs may be freely made to consumers without reference to the prohibitions of, and the machinery provided by, the earlier part of the section, then to procure the drugs on order forms for the purpose of such unrestricted sales would not

be a violation of the next to last paragraph, since it would be in a lawful business or in the legitimate practice of a profession.

It has been shown that the purpose of section 2 looked at as a whole, and in connection with the other sections of the act, was to prevent frauds on the revenue by prohibiting consumers (who are not subject to registration and tax) from obtaining the drugs except through the medium of a physician or a physician's prescriptions. Only in this way, as Congress thought, could producers of, or dealers in, the drugs who desired to evade registration and payment of the tax be prevented from getting the drugs without paying the tax. Such dealers could not lawfully employ the agency of a physician or a physician's prescriptions, and hence would be driven to the use of official order forms which they could not procure without registering and paying the tax. To throw down the bars and permit any person who claimed to be a consumer, and therefore not subject to the tax, to obtain the drugs from any producer or dealer (wholesale or retail) without the safeguard of a physician's indorsement of him as a genuine consumer would be to defeat entirely the purpose of the act and the efficiency of its administrative provisions, and to open the door wide to frauds of all character.

The small quantity of the drugs needed for successful dealing in them, the secrecy with which they can be disposed of, and the very high prices which even small quantities bring, demonstrate

the truth of this statement. The result of the limited construction contended for might not improbably be the registration of a few producers or wholesale dealers who would pay the tax while all other dealers obtained the drugs surreptitiously under the guise of consumers without registration or payment of the tax. An unscrupulous physician, such as the defendant Webb, might procure what would be large quantities of the drug, considering its nature, under the plea that he was an addict and then proceed to dispose of them as a dealer to smaller dealers, i. e., peddlers. There is nothing in the present record which discountenances the probability of such a fraud, even with the strict limitations placed by section 2 upon consumers by the requirement of the intervention of a physician. How much easier would be the commission of such frauds if any person calling himself a consumer could procure the drugs in any quantity from any dealer without the use of an order form, with its consequent official supervision of the real purpose for which he desired the drugs.

This natural construction of section 2 derived from an examination of the main purpose of the act is fortified by the explicit provisions of subsections (*a*) and (*b*) of section 2. These subsections are exceptions to the main provisions of the first paragraph of section 2, and are introduced by the phrase, "Nothing contained in this section shall apply." They expressly deal with consumers under the name

of "patients" in subsection (*a*), and under the very term "consumer" in subsection (*b*), and they are exhaustive in their nature, furnishing evidently the only method by which consumers can obtain the drugs. If consumers could obtain the drugs without any of the formalities prescribed by the two subsections, then evidently these subsections have no meaning at all. Indeed in that event the whole section is in fact rendered meaningless, for its whole purpose was to have an official or expert determination of the question whether a person was in fact a consumer or a dealer, and to that end to permit the drugs to be obtained in two ways and in two ways only, (1) by official order forms, (2) by physicians' prescriptions. To say that the drugs can be obtained in a third way, namely, without the use of either order forms or physicians' prescriptions is evidently to put a construction on the act which the language used by Congress will not possibly bear.

(b) Question 2.—The constitutionality of the act as so construed.

(A) THE AUTHORITIES.

It is believed no claim will be made that the general provisions of section 1 of the act levying an excise tax on producers of and dealers in certain drugs is unconstitutional, as it is in line with many other Federal excise taxes which have been sustained, e. g., those on wholesale and retail liquor dealers and on corporations doing business as such.

The claim must be therefore that the special provisions of section 2, which have been discussed above, are so clearly and positively unrelated to the end of the collection of an excise tax as to constitute them beyond the legislative power of Congress. In order to determine whether this be true or not, a brief statement of certain decisions of this court upon analogous questions will be helpful as showing the attitude of this court toward the taxing power of Congress, and the presumptions which will be indulged in favor of the lawfulness of the means adopted by Congress to effectuate the exercise of that power.

(1) CERTAIN GENERAL DECISIONS ON THE USE OF THE TAXING POWER AS AFFECTING SOCIAL OR MORAL QUESTIONS.

The best known example of the effect of taxes beyond the mere raising of revenue is the protective tariff taxes whose constitutionality is now clearly established. Not only these taxes themselves, but also the means authorized for their assessment and collection were notoriously adopted largely for the purpose of encouraging the establishment and successful prosecution of certain industries. Under the same head might be put the tax on the use of foreign-built yachts, which was sustained in *Billings* v. *United States*, 232 U. S. 261.

In the *License Tax Cases*, 5 Wall. 462, a tax in the guise of a license was laid on the selling of lottery tickets and the retail dealing in liquors. It was

objected that such a license was an interference with the police powers of the several States. In holding the act constitutional this court said (5 Wall. p. 473):

> There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former—if the business is found existing notwithstanding the prohibition—discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, a prohibitive and special tax was laid on the notes of State banks, for the purpose (as was well known) of driving them out of circulation. In sustaining its constitutionality this court said (8 Wall., p. 548):

> It is insisted, however, that the tax in the case before us is so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.

> So if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

In the *Head Money Cases*, 112 U. S. 580, the act levying a duty upon shipowners bringing alien passengers to this country from foreign parts was sustained. Answering the objection that the levy was not uniform because it did not apply to aliens brought by rail, this court said (112 U. S. 595):

> * * * It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. * * *

In *Magoun* v. *Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41; and *Brushaber* v. *United States*, 240 U. S. 1, taxes graduated according to the amount of income of the taxpayer were sustained against the objection that they were in reality intended to affect the natural distribution of wealth, this court saying in the latter case (240 U. S., p. 25):

> In this situation it is of course superfluous to say that arguments as to the expediency of laying such taxes or of economic mistake or wrong involved in their imposition are beyond judicial cognizance.

In *In re Kollock*, 165 U. S. 526, the act levying a special tax on dealers in oleomargarine was sustained, the court saying (165 U. S. 536):

> The act before us is on its face an act for levying taxes, and although it may operate in

> so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

In *McCray* v. *United States*, 195 U. S. 27, the later act levying a higher tax on oleomargarine was sustained over a very strong showing that it was intended merely to suppress the production of and dealing in oleomargarine, and was therefore an interference with the reserved police powers of the States. The reason given by the Court was as follows (195 U. S. 63, 64):

> * * * As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due-process clause of the fourteenth amendment, absolutely prohibit the manufacture of the article. It hence results that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it can not be said that such repression destroys rights which no free Government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due-process clause of the fifth amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of

> power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

It may be noted as to this case that under the act (as it would seem) oleomargarine, even if so labeled and hence not deceptive, would have to pay a much higher tax than adulterated butter.

Certain cases in this court sustaining State taxing laws seem also in point.

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, a statute levying a tax upon refiners of sugar but exempting planters and farmers was sustained, the court saying (179 U. S. 95):

> The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

On page 93 of the opinion in this case several instances are given where Congress in levying Federal taxes has exempted classes on the principle of the Louisiana statute. Of these examples the act of July 1, 1862, 12 Stat. 432, seems especially applicable

to the present case, in that it levied a tax on retail dealers in goods, but excepted "apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making of medicines for lame, sick, or diseased persons." In *United States* v. *Calhoun*, 39 Fed. 604, Judge Simonton in charging the jury in a case of violation of this act (now section 3246, R. S.) said:

> An apothecary who bona fide uses spirituous liquor exclusively in the preparation or making up of medicines need not pay the special tax. These are the questions you must answer in this case: In the sale made by defendant to witnesses for the Government did he bona fide sell the compound to them as medicine, and not as a beverage, or was the compound simply whisky in disguise? Is it a medicine to cure disease, or is it intended to gratify his thirst for drink? * * *

This statute and charge are not directly in point, because the former merely exempted certain dealers, and the question was whether the person involved was liable to the tax or was covered by the exemption, while in the present case both Webb and Goldbaum have paid the tax as dealers; but they show the right of Congress, in order to prevent frauds on the revenue, to distinguish between persons prescribing the article as a medicine and persons merely pretending to do so, thus in effect regulating the business of a druggist or a physician.

In *Cook* v. *Marshall County*, 196 U. S. 261, a law of the State of Iowa imposing a heavy tax on retailers

of cigarettes but exempting jobbers and wholesalers doing an interstate business was sustained. The moral purpose of this legislation is obvious.

In *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, an act levying a tax on all manufacturers within a certain class, to pay compensation to employees injured in any manufactory of that class, was sustained, and on pages 244, 245 a number of instances and authorities are collected of taxes laid to correct a supposed social injustice.

Finally, in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402, this court said of the act now under consideration:

> It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.

These cases (and many others which could be cited) demonstrate the strong reluctance of this court to declare a taxing act unconstitutional because it is claimed to interfere with the reserved powers of the States or to have been enacted for other purposes than appear upon its face. If it be on its face a valid exercise of the taxing power, every reasonable presumption will be indulged in its favor. The mere fact that part of its purpose, or perhaps its main purpose, is to promote some political, economic, social, or moral end is not sufficient to render it unconstitutional in the courts.

(2) SPECIAL AUTHORITIES ON THE MEANS WHICH MAY BE EMPLOYED IN A TAXING STATUTE.

Having thus observed the general attitude of this court toward taxing laws analogous to the act now under consideration, the next question is as to its attitude toward the means which Congress may constitutionally employ to reach its end (the decisive point in the case at bar in so far as question 2 is concerned).

In *In re Kollock*, 165 U. S. 526, the question was as to the validity of certain regulations covering the manner in which taxed oleomargarine should be packed and labeled. The Commissioner of Internal Revenue had provided by regulations as follows (165 U. S. p. 530, 531):

> * * * that the wooden or paper packages in which retail dealers in oleomargarine were required by said act of Congress to pack the oleomargarine sold by them, such retail dealers, should have printed or branded upon them in the case of each sale the name and address of the retail dealer making the same; likewise the words "pound" and "oleomargarine" in letters not less than one-quarter of an inch square, and likewise a figure or figures of the same size indicating (in connection with said words "pound" and "oleomargarine") the quantity of oleomargarine so sold, written, printed, or branded on such wooden or paper packages and placed before the said word "pound," and that the said words "oleomargarine" and "pound" so required to be printed or branded on such packages as afore-

> said in the case of each sale as aforesaid and the said figure or figures so indicative of quantity as aforesaid in the case of each sale as aforesaid and so required to be written, printed, or branded on such packages as aforesaid should be so placed thereon as to be plainly visible to the purchaser at the time of the delivery to him, such purchaser, by such retail dealers of the oleomargarine sold to such purchaser, by them, such retail dealers.

This court said as to these regulations (165 U. S. 536):

> And, *considered as a revenue act*, the designation of the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer.

The case of *McCray* v. *United States*, 195 U. S. 27, affirmed the constitutionality of the same act with a higher tax rate, and, while nothing was said as to the administrative measures adopted to carry out the revenue ends, the court, as pointed out above, approved expressly these administrative provisions as designed to prevent deception by the selling of oleomargarine for adulterated butter.

In *Nicol* v. *Ames*, 173 U. S. 509, an excise tax upon sales or agreements to sell at any exchange or board of trade was held constitutional. The act, as stated

by this court, as a basis for its decision, provided as follows (173 U. S. 513, 514):

> * * * *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof, as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

In regard to this provision of the act, this court said (173 U. S. 523, 524):

> * * * It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it secured by proper penalties the making of the memorandum. Instead of a memorandum, Congress might have required a sworn report, with the proper amount of stamps thereon, to be made at certain regular intervals of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect.
>
> The means actually adopted do not illegally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means for collecting the tax which would prove less troublesome or annoying to the taxpayer can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has the power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

In *Felsenheld* v. *United States*, 186 U. S. 126, a case was certified to this court singularly like the present. The first question was whether the third clause of the tenth section of the act of July 24, 1897, was constitutional (186 U. S., p. 130). The certificate had a statement of facts, as in the case at bar, in which it was stated (186 U. S. 127) that manufacturers of tobacco had fallen into the habit of inclosing in their packages prizes for the persons who bought them, and that the Internal Revenue Bureau had promulgated a regulation that the tax should be paid on the full weight of the package, including the prizes. It was stated in these regulations that the practice of including prizes, coupons, etc., should be discontinued. Acting upon the idea formulated in these regulations, Congress passed the third clause of the tenth section of the tariff act of 1897, which provided that no packages of tobacco or cigarettes should have packed in them anything else than the manufacturers' wrappers and labels, the internal-revenue stamp, and the tobacco itself; and there was an additional provision as follows (186 U. S., p. 127):

> * * * nor shall there be affixed to, or branded, stamped, marked, written, or printed upon said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

The tobacco in question was forfeited because the owner of certain chewing and smoking tobacco inserted in the packages a small slip advertising his

wares and offering prizes to purchasers. The certificate stated (186 U. S. 129):

> This coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself, and has upon it no picture of any kind *and does not affect, in any way, the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax.*

Upon this statement of facts the question was directly presented to this court as to the constitutionality of this legislation, which, it was claimed, was directed, under the pretense of taxation, at the offering of prizes, coupons, etc., to the purchasers of tobacco. This court sustained the constitutionality of the act in the following language (186 U. S. 132, 133, 134):

> It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be either expressly or by implication an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute and the courts may not draw a line between the

foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold in reference to a particular package the act valid if the size or weight is appreciable and invalid if it is not.

Among the regulations prescribed by Congress in its internal-revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3392) that cigars shall be put up in boxes containing twenty-five, fifty, one hundred, two hundred and fifty, or five hundred each. There is no special efficacy in either of these numbers. Boxes containing fifteen, thirty, or sixty cigars would apparently afford just the same facilities for taxation, and yet can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may for purposes of uniformity compel compliance with the rule. So, if it should prescribe that at least nine-tenths of every package, purporting to be a package of a particular kind of tobacco, and subject to a special tax, should be that particular kind of tobacco, would the manufacturer be permitted to make one-third of the contents of some other kind of tobacco or any other substance? The proportion might be arbitrarily selected, it is true, but is it not clearly within the power of

Congress in its regulations to make such arbitrary selection? And if it may say that not less than nine-tenths of the contents shall be that particular tobacco, the subject of the tax, is it any the less within the power of Congress to prescribe that there shall be nothing in the package save that tobacco?

Indeed, the admission that the Government may require that the contents of a package shall be partly of the goods which it taxes is a concession that it may also require the entire contents to be such goods.

There is in this statute no trespass upon the manufacturer's right to fully advertise his goods or to offer with the utmost freedom inducements for their purchase. He can put into the box in which he ships his packages all the advertising material he sees fit. That which is required is that each separate package shall be in its entirety a package of tobacco, and only tobacco. Beyond that the manner in which he shall sell, or the advertisement he shall make of his tobacco after the tax has been paid, and the packages have been stamped, is a matter for him to determine.

We are of opinion that it is within the power of Congress to prescribe that a package of any article which it subjects to a tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

In *United States* v. *132 Packages*, 76 Fed. 362, the Court of Appeals of the Eighth Circuit (Judges

Caldwell and Sanborn) held constitutional the following provision of section 3449, R. S.:

> Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such an act to be done, he shall forfeit such liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars.

The court said (76 Fed. 367, 368):

> * * * The contention of the learned counsel for the claimant that the section is nothing but a trade-mark regulation is not tenable. It is one of the numerous regulations prescribed by the internal-revenue laws intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product, and its removal, shipment, and sale. The court can not say that section 3449 does not conduce in any degree to prevent frauds on the revenue, or aid in their discovery and punishment. Unquestionably, an observance of the requirement that packages of liquor shall be shipped or removed only under names indicating

truthfully their contents will aid the revenue officers to trace and identify such packages, and thereby verify the truth or falsity of the books and records of the distiller or rectifier. There are doubtless other ways familiar to the revenue officers in which the requirement of section 3449 tends to the detection and suppression of frauds on the revenue. Before a court would be authorized to hold an act of Congress obsolete and inoperative, it would have to appear conclusively that it was totally inoperative for any lawful or useful purpose. When the statute relates to a subject matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose. When a statute is susceptible of two constructions, one of which would render it valid and operative and the other press it beyond the constitutional competency of Congress to enact, or render it inoperative, the former construction will be adopted. The section is none the less a revenue regulation because its enforcement may tend to discourage the piracy of trademarks and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute and not its primary object. Congress has an undoubted right to legislate to prevent frauds on the public revenue and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

There is nothing in *United States* v. *Dewitt*, 9 Wall. 41, cited by this court in *Jin Fuey Moy's case*, 241

U. S. 394, at page 401, opposed to the above decisions, because in Dewitt's case no tax at all was levied upon the articles in question, and therefore this court said (9 Wall. 44):

> * * * And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while in the case before us no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them by excluding from the market the particular kind described.

These decisions demonstrate that the same presumption prevails in favor of the constitutionality of the means adopted by Congress to effectuate its exercise of the taxing power as prevails regarding the exercise of the power itself. It is not simply that this court does not claim the power to decide whether the means and methods adopted by Congress are wise and well advised or not. The rule goes much further than this. This court recognizes that where Congress has acted clearly in the exercise of its taxing power (as in the case of the act now under consideration),

the means employed to effectuate this legitimate functioning are in their nature practical, belonging to the field of experiment and experience, and outside of the field of judicial knowledge. Hence, if it once be determined that the main provision of the act levying the tax and defining its incidence is constitutional (as it is undoubtedly in the act now under consideration), the means devised by Congress for the collection of the tax and the prevention of frauds in connection with it will, except in the most extraordinary case, be held to be within the proper scope of the legislative power. Indeed, as this court has said, the very nature of the legislative power implies the power to select the means, methods, and agents by and through which the main powers conferred on the legislature by the Constitution may be carried into effect. This is not to say that this court will not consider a claim that the means employed by Congress to carry out its legitimate ends are in themselves unconstitutional. It is, however, to say that every presumption is against such a claim, and that if, by any reasonably fair intendment, the means can possibly be brought into connection with the main end of taxation, they will be sustained, and that no suspicion, however strongly supported, that these means were in fact designed for political, social, or moral ends, is sufficient to overcome the presumption. The burden is upon the objector (in this case the defendants), and he is bound to show, e. g., in the case at bar, that under no possible circumstances existing in the drug traffic among human beings at

the present day can such provisions as are contained in the act now under consideration relating to the use of order forms and physicians' prescriptions have any possible bearing on the collection of taxes constitutionally levied upon the producers of and dealers in these drugs.

(3) APPLICATION OF THESE AUTHORITIES, AND CONCLUSION OF ARGUMENT ON QUESTION 2 AS TO THE CONSTITUTIONALITY OF SECTION 2.

We have now abstracted and analyzed the statute in question, and have given our interpretation of its meaning; we have cited and quoted from authorities dealing with the exercise of the taxing power by Congress in cases analogous to this, and especially in cases dealing with the means, methods, and agents created by Congress to carry out its great taxing power. It only remains to apply the law declared by this court to the act now under consideration as above abstracted, analyzed, and interpreted. The minute the problem is approached in this way, it is evident that the Government does not need the full benefit of the presumption which it is entitled to under the decisions in in re Kollock, *supra*, *Nicol* v. *Ames*, *supra*, and *Felsenheld* v. *United States*, *supra*. We maintain that sections 1 and 2 of the act plainly, by their explicit terms, when carefully examined, show an intention of Congress to distinguish between consumers and dealers, for the purpose of revenue merely; that the provisions as to official order forms and physicians' prescriptions have a clear and direct connection with the prevention of frauds on the

revenue in that they are aimed to prevent the obtaining of the drugs by dealers, who do not intend to register and pay the tax, under the guise of genuine consumers, i. e., patients or drug addicts. The necessity and wisdom of these provisions as a prevention of frauds upon the revenue is recognizable when there is borne in mind the present enormous traffic in these drugs and the well known tendency of the illicit dealer in them as well as the habitual user to cover with every possible secrecy as far as possible both their sale and use.

From statistics and data obtained by special narcotic committee concerning this narcotic drug addiction, it is conservatively estimated that there were treated or prescribed for during the year 1917 a total of 750,000 addicts of all ages and sexes. The fact that 214,941, or 80 per cent of the total number of 270,662 under treatment reported from the entire United States, were reported from the two States having compulsory registration, furnishes a basis for approximating the total number of addicts in the country. Reports from an agricultural State in which registration is compulsory show that the addicts represent 0.7 of the population, while similar data obtained from an industrial State show the percentage of addicts to be 2.1. From this it may be estimated that there are 1,500,000 drug addicts in the United States, or 1.4 per cent of the total population. Congress, no doubt, having facts somewhat similar to these before it, in its wisdom saw fit to adopt the method it did in this law for the imposi-

tion of the tax, and the assurance of its payment. "Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its judgment must be conclusive in that respect."

(c) Question 3.

The question evidently asks the opinion of this court as to the meaning of the term "prescription," since clearly this term is used in the act in its ordinary meaning. The Century Dictionary defines this term as follows:

> In medicines, a statement usually written, of the medicines or remedies to be used by a patient, and the manner of using them.

Murray's new English dictionary gives the following:

> A direction or formula (usually) written by a physician for the composition and use of a medicine.

These definitions undoubtedly represent the meaning and intent of Congress in its use of the term "prescription" in subsection (*b*) of section 2.

It follows necessarily that an order given to a drug addict, not for the purpose of curing him of his habit, but for the purpose of satisfying his craving, is not a prescription. If it is, then the same dignified term must be applied to the "prescription" by a barkeeper of the whisky needed by a drunkard "to keep him comfortable by maintaining his customary use." It would be trifling with the enactments of Congress to say that the defendant Webb, on the

record now before this court, ever prescribed any morphine to anybody. He dealt and trafficked in drug, but the facts stated in the certificate preclude any possibility of his having ever acted as a genuine, high-minded physician in the noble profession to which he claims to belong.

This, we believe, is sufficient to dispose of the third question. Looking at the matter more broadly, however, the question is fully answered by what has been said above in regard to the first and second questions.

The constitutionality of the act, in so far as the provisions of subsection (*a*) of section 2 are concerned, was sustained by Judge Learned Hand in the case of *United States* v. *Rosenberg*, 251 Fed. 963, the court proceeding upon the principles stated in this brief.

It has also been upheld, as to its constitutionality, by the Circuit Court of Appeals for the Fourth Circuit in an opinion rendered December 5, 1918, in the case of *Walter F. Foreman* v. *The United States of America*, by the Court of Appeals for the Fifth Circuit in *Baldwin* v. *United States*, 238 Fed. 793, and by the Court of Appeals for the Eighth Circuit in *Hughes* v. *United States*, decided October 28 last.

In this latter opinion the Court of Appeals, speaking by Judge Hook, used the following language:

> It is urged that the purpose of the statute was the suppression of the drug habit and that it is therefore not a revenue measure but one of police within the exclusive province of the States. But we think it can not be said that

the provisions referred to have no real or substantial relation to the raising of revenue. If they have such relation we have nothing to do with any other purpose of Congress. The traffic in such drugs is of a peculiar character. Considerable of it is carried on covertly by peddlers, and the small bulk of the articles facilitates clandestine distribution. The difficulties of subjecting the traffic to excise and preventing frauds on the revenue are obvious, and it was competent for Congress to bring the traffic into the open. That there may be consumers of the drugs who can not or will not obtain them in the ways provided is not enough to condemn the statute. Substantially the same result might have followed a heavy tax on such transactions, as to which there would be no color for claim of unconstitutionality. In a case involving another provision, this same statute was held to be a revenue measure. *United States* v. *Jin Fuey Moy*, 241 U. S. 394; 225 Fed. 1003.

CONCLUSION.

The first question should be answered in the affirmative, the second in the negative, and the third in the negative.

CLAUDE R. PORTER,
Assistant Attorney General.
W. C. HERRON,
Attorney.

DECEMBER, 1918.

○

WEBB ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 370. Argued January 16, 1919.—Decided March 3, 1919.

The first sentence of § 2 of the Narcotic Drug Act of December 17, 1914, c. 1, 38 Stat. 785, prohibits retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued under the act. P. 99.

This construction does not make unconstitutional the prohibition of such sale. *Id.* *United States* v. *Doremus*, *ante*, 86.

If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, such order is not a physician's prescription under exception (b) of § 2 of the act. *Id.*

THE case is stated in the opinion.

Mr. Ralph Davis, with whom *Mr. Ike W. Crabtree* was on the brief, for Webb *et al.*, defendants, contended that a druggist, who has paid the tax and registered under the act and obtained the drug by use of the required form, has a right to sell directly to the consumer, and that the part of the act making it unlawful to do so without a physician's prescription is beyond the power of Congress, and an invasion of the police power of the States, citing: *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Meffert* v. *Packer*, 195 U. S. 625; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *In re Kollock*, 165 U. S. 526; *Blunt* v. *United States*, 255 Fed. Rep. 332; *Mugler* v. *Kansas*, 123 U. S. 623, 661.

Mr. Assistant Attorney General Porter, with whom *Mr. W. C. Herron* was on the brief, for the United States.

Mr. Frans E. Lindquist, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the provisions of the Harrison Narcotic Drug Act, considered in No. 367, just decided, *ante*, 86. The case comes here upon a certificate from the Circuit Court of Appeals for the Sixth Circuit. From the certificate it appears that Webb and Goldbaum were convicted and sentenced in the District Court of the United States for the Western District of Tennessee on a charge of conspiracy (§ 37, Penal Code) to violate the Harrison Narcotic Law. 38 Stat. 785; 6 U. S. Comp. Stats. 1916, § 6287g. While the certificate states that the indictment is inartificial, it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks (§ 1 of the act) for a prohibited purpose.

The certificate states: "If § 2, rightly construed, forbids sales to a non-registrable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are 'prescriptions,' within the meaning of exception (b) in § 2.

"We conclude that the case cannot be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the facts as follows,—assuming, as for this purpose we must do, that whatever the evidence tended to show in aid of the prosecution, must be taken as a fact:

"Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular cus-

tom and practice to prescribe morphine for habitual users upon their application to him therefor. He furnished these 'prescriptions,' not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit or as might be necessary or helpful in an attempt to break the habit, but without such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by § 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by § 2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine, which morphine he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum and without any physician's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; that Webb regularly charged fifty cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over 4,000 such prescriptions; and that one Rabens, a user of the

drug, came from another state and applied to Webb for morphine and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Rabens' presentation, although each was made out in a separate and fictitious name."

Upon these facts the Circuit Court of Appeals propounds to this court three questions:

"1. Does the first sentence of § 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued?

"2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

"3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of § 2?

"If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial."

What we have said of the construction and purpose of the act in No. 367 plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367. As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that

no discussion of the subject is required. That question should be answered in the negative.

Answers directed accordingly.

For the reasons which prevented him from assenting in No. 367, THE CHIEF JUSTICE also dissents in this case.

MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS concur in the dissent.